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In the Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BILDISCO AND BILDISCO, DEBTOR-IN-POSSESSION, ET AL.

LOCAL 408, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ETC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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1. Respondent Bildisco contends (Br. 21) that the Second Circuit's *Kevin Steel/REA Express* standard for rejection of a collective bargaining agreement "runs afoul of the fundamental bankruptcy policy of requiring all creditors to share equally in the sacrifices required to achieve a successful reorganization." It contends (Bildisco Br. 14-15) that the

test adopted by the court below is more balanced because it not only gives recognition to the rights of union employees under the national labor policy, but also considers "the claims and interests of the debtor's other creditors and make[s] a reasoned determination that rejection of the labor contract will assist in the achievement of a satisfactory reorganization." These contentions do not withstand analysis.

a. Bildisco's suggestion that the *Kevin Steel/REA Express* standard gives an unfair preference to employees represented by a union over other creditors is wide of the mark. This case does not involve the rights of bargaining unit employees as pre-petition creditors vis-a-vis the rights of other pre-petition creditors.[1] Rather, the issue before the Court is the nature of a debtor-in-possession's obligations under a collective bargaining agreement during the post-petition period.

Contrary to Bildisco's suggestion, the bankruptcy laws themselves support the conclusion that the interests of those who deal with the debtor-in-possession during the post-petition period take prece-

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[1] In situations in which the employer has failed to adhere to a collective bargaining agreement in the pre-petition period (as was the case with Bildisco), employees in the bargaining unit stand on no different footing than any other class of creditors with respect to their pre-petition claims against the employer. Section 507(a)(3) of the Bankruptcy Code, 11 U.S.C. 507(a)(3), accords third priority to wage claims up to $2,000 for the 90-day period immediately prior to the filing of the petition. The reorganization plan determines the extent to which the pre-petition claims of both the unit employees and all other creditors will be paid. Bildisco is simply wrong in contending (Br. 21-22) that if a bankruptcy court fails to permit rejection of a collective bargaining agreement unit employees (in contrast to all other classes of creditors) will escape "unscathed."

dence over the interests of pre-petition creditors. This is in keeping with the very purpose of the debtor-in-possession arrangement, which is to help the business survive by enabling it to incur obligations that will not be compromised by the debtor's prior financial difficulties. Thus, as this Court stated in *Reading Co.* v. *Brown*, 391 U.S. 471, 475 (1968), "the larger objective, common to arrangements, [is that] of operating the debtor's business with a view to rehabilitating it." Accordingly, the Bankruptcy Code provides that first priority is given to expenses of administration. See 11 U.S.C. 503, 507. And this Court in *Reading Co.* v. *Brown*, *supra*, generously interpreted such expenses, in recognition that those who deal with the debtor-in-possession in the post-petition period should not be required to sacrifice their interests to the interests of pre-petition creditors. The Court there held that claims for damages resulting from the negligence of the receiver during the post-petition period are expenses of administration entitled to priority. The Court explained (*id.* at 482-483):

> [I]n considering whether those injured by the operation of the business during an arrangement should share equally with, or recover ahead of, those for whose benefit the business is carried on, the latter seems more natural and just. Existing creditors are, to be sure, in a dilemma not of their own making, but there is no obvious reason why they should be allowed to attempt to escape that dilemma at the risk of imposing it on others equally innocent.

See also, *e.g.*, *In re Tucson Yellow Cab Co.*, 27 Bankr. 621, 623 (Bankr. 9th Cir. 1983) (employee claims under the National Labor Relations Act may

not be ignored "merely in order to permit unsecured creditors to obtain a satisfaction on their claims"); *In re Mammoth Mart, Inc.*, 536 F.2d 950, 954 (1st Cir. 1976) (fairness requires that any claims incident to the debtor-in-possession's operation of the business be paid before those of creditors for whose benefit the continued operation of the business is allowed).

Moreover, even the court below purported to recognize (82-818 Pet. App. 12a-13a) that the accommodation of bankruptcy policy to the national labor policy requires a higher standard for rejection of a collective bargaining agreement than for rejection of other types of executory contracts. Because a collective bargaining agreement may not be set aside merely because it would benefit the estate, employees covered by such an agreement receive more protection than creditors under normal commercial contracts. As a result, creditors with accrued claims may have to make sacrifices that employees covered by a collective bargaining agreement are not required to make. But in view of the need to accommodate the objectives of national labor policy, that result cannot be characterized as inconsistent with congressional intent. See Bordewieck & Countryman, *The Rejection of Collective Bargaining Agreements by Chapter 11 Debtors*, draft at 21-23 (to be published in the October 1983 issue of American Bankruptcy Law Journal) (hereinafter "Bordewieck and Countryman").[2]

b. The *Kevin Steel/REA Express* standard (described in our opening brief at pages 23-24) ensures

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[2] We are lodging copies of the draft article by Bordewieck and Countryman with the Court and providing copies to counsel for the parties and amici.

that a collective bargaining agreement will be set aside only for reasons of real economic necessity, *i.e.*, when it is demonstrably necessary to accomplish the bankruptcy policy goal of creating conditions that will forestall collapse of the business. The standard does not ignore the interests of either creditors or others who deal with the debtor-in-possession during the arrangement. If the debtor-in-possession is able to operate successfully under a collective bargaining agreement, creditors will be paid under the reorganization plan ultimately approved by the bankruptcy court. If the debtor-in-possession cannot operate successfully under the collective agreement, it may apply for rejection of the agreement at any point up to the time of adoption of the plan.[3]

Moreover, the *Kevin Steel/REA Express* standard does not require maximum sacrifices by nonunion employees or others with whom the debtor-in-possession deals as a prerequisite to rejection of a collective

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[3] Bildisco repeats the assertion, accepted by the court below (82-818 Pet. App. 14a-15a), that the *Kevin Steel/REA Express* standard is inadequate because it is difficult to predict at an early point whether a business will fail absent rejection of a collective bargaining agreement. Bildisco Br. 24-25. We explained in our opening brief (at 26) that this concern is entitled to little weight, since a debtor-in-possession may apply for rejection at any point during the proceeding, *i.e.*, whenever it becomes possible to make the necessary showing. As Bordewieck and Countryman point out, the difficulty of predicting success or failure at an early stage weighs in favor of a more stringent test for rejection of a collective bargaining agreement. "Permitting a bankruptcy court to reject a collective bargaining agreement because it cannot tell whether or not the reorganization is going to succeed effectively performs the delicate balancing of conflicting statutory objectives by placing a cinder block on the Bankruptcy Code side of the scale." Bordewieck & Countryman, *supra*, at 26.

bargaining agreement.[4] A debtor-in-possession need not make a showing that salaries and wages of managerial personnel or non-represented employees have been slashed to the bone or that the business would be crippled by cost-cutting measures. However, in circumstances in which labor costs of represented em-

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[4] Thus, the cases that have applied the *Kevin Steel/REA Express* standard and that were cited in our opening brief (at 24 n.13) did not involve a refusal to allow rejection on the ground that other creditors had not made the utmost sacrifice. Rather, the courts in those cases generally found that altering the terms of the collective bargaining agreement would not make the difference between success or failure. See, *e.g.*, *In re Connecticut Celery Co.*, 106 L.R.R.M. (BNA) 2847, 2852 (Bankr. D. Conn. 1980) (costs of union benefits were only three percent of operating expenses; submission by the debtor and confirmation of a plan that did not include rejection of collective bargaining agreement amounted to a concession that the requirements of the plan could be met without rejection); *In re Miles Machinery Co.*, No. 81-00388 (Bankr. E. D. Mich. June 17, 1982), slip op. 7-8 (factors such as bidding and pricing mechanisms, design and engineering costs, and number of customers, rather than labor costs, were identified as key to debtor's survival). In *In re David A. Rosow, Inc.*, 9 Bankr. 190 (Bankr. D. Conn. 1981), relied on by Amicus Curiae Chamber of Commerce (Br. 7-8), the court did not refuse rejection because further sacrifices could be extracted from the nonunion workforce. Rather, the court noted that rejection of the collective agreement would effect a savings of $636.17 per week and that operating expenses amounted to $100,000 per week and concluded that savings resulting from rejection would be *de minimis*. The court observed that the debtor had cut the wages and benefits of its 125 nonunion employees prior to filing its Chapter 11 petition, but rejected the debtor's argument that the wages of the 12 union employees must therefore be cut in a comparable manner. In addition, the court observed that no adjustment had been proposed in the debtor's rental payments of $15,000 per month to its sole stockholders. *Id.* at 193 n.6.

ployees do not constitute the overwhelming share of operating expenses, it is entirely appropriate to assess whether a successful reorganization could be accomplished by measures other than rejection of a collective bargaining agreement. The *Kevin Steel/REA Express* standard accordingly does require the bankruptcy court to determine whether the debtor-in-possession has taken whatever steps a reasonably prudent person would take to ensure viability before allowing rejection of the collective agreement. See, *e.g.*, *In re Blue Ribbon Transportation Co.*, BK No. 8300362 (Bankr. D.R.I. June 24, 1983) (court required debtor to cut excessive management salaries and cease maintaining seven automobiles for the personal use of management and their families as a condition to allowing rejection of the collective agreement).

It may well be that application of the *Kevin Steel/REA Express* standard results in securing the benefits of a collective bargaining agreement for employees in the bargaining unit, while others who work for, or deal with, the debtor-in-possession during the post-petition period are not similarly protected. But contrary to the contentions of Bildisco (Br. 14-16) and Amicus Curiae Chamber of Commerce (Br. 9-10), that result flows from the national labor policy fostering collective bargaining, not from any policy of favoring employees represented by a union over other employees. It is clear that the National Labor Relations Act accords rights and protections to employees under collective bargaining agreements that other employees may not have. See *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33-34, 42 (1937). It is a violation of the Act for an employer unilaterally to abrogate or modify a collective agreement, even if economic hardship dictates such a course. See

our opening brief at 16-18. Thus, an employer that has not filed a bankruptcy petition, but is suffering financial difficulties, may be able to change at will the terms of employment for employees not covered by a collective agreement, but it could not do so in the case of employees covered by such an agreement. This principle furthers the basic purpose of the Act—promotion of collective bargaining in order to "facilitate agreement in place of economic warfare." *Allied Chemical Workers Local Union No. 1* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 187 (1971). "Enforcement of the obligation to bargain collectively is crucial to the statutory scheme." *NLRB* v. *American National Insurance Co.*, 343 U.S. 395, 402 (1952). See also *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 674 (1981).

This policy deserves weight in the context of bankruptcy proceedings, no less than in other contexts. The fact that bankruptcy proceedings are underway does not justify stripping employees represented by a union of the special statutory protection afforded to their collective bargaining rights merely because such protection is not enjoyed by other employees.[5]

c. The test adopted by the court below not only elevates the interests of pre-petition creditors in a manner not justified by bankruptcy policy; it also accords insufficient weight to the national labor policy

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[5] The assertion of Amicus Curiae Chamber of Commerce (Br. 9) that "the government should remain 'wholly neutral' as to whether or not employees should unionize and bargain collectively" is overstated. The Act is neutral with respect to whether employees should unionize. But once employees have chosen to do so, the Act is not neutral with regard to the obligation of employers to bargain with the employees' chosen representative and to refrain from destabilizing contractual relations.

by permitting rejection of collective bargaining agreements far too readily. Under the Third Circuit's test the bankruptcy court is to balance equities and make a "reasoned determination" that rejection will assist the debtor-in-possession in achieving a satisfactory reorganization (82-818 Pet. App. 17a). Such a showing no doubt could be made in most cases merely on the basis that it would be less costly or burdensome for an employer to operate without adhering to the collective agreement.

Recent cases indicate that bankruptcy courts that apply a test less stringent than the *Kevin Steel/REA Express* standard are inclined to grant rejection on what appear to be insubstantial grounds. For example, the court in *In re Reserve Roofing Florida, Inc.*, 21 Bankr. 96 (Bankr. M.D. Fla. 1982), in granting rejection under a balancing of the equities test, found it significant that the collective bargaining agreement required the debtor to "incur significant expenses which are not necessary to the performance of [its roofing] contracts." *Id.* at 98. As Bordewieck and Countryman note, consideration of whether a collective bargaining agreement is "necessary" to the debtor's operations flies in the face of the national labor policy:

> Given the NLRA and the policies underlying it, expenses stemming from a collective bargaining agreement advantageous to the union are indeed a "necessary" part of the business operation, whether the employer likes it or not. The fact that the union has struck a good deal does not mean that the costs of the collective bargaining agreement are not "necessary" because in an utterly non-union world cheaper labor would be available. The court's conclusion [in *Reserve Roofing Florida*] seems premised on the assump-

> tion that the non-union world furnishes the paradigm against which a debtor's position is to be compared. Given the fundamental labor policy that collective bargaining is *the* preferred method of employer/employee relations, such an assumption is untenable.

Bordewieck & Countryman, *supra*, at 40-41. See also *In re Ateco Equipment, Inc.*, 18 Bankr. 915, 916-917 (Bankr. W.D. Pa. 1982), in which the court allowed rejection because "savings" of $2,250 per month could be realized by not paying the contractual wage rate and because workers with seniority could be laid off "more easily."

The case of *In re Southern Electronics Co.*, 23 Bankr. 348 (Bankr. E.D. Tenn. 1982), illustrates well that in practice the application of a "flexible" test does not afford protection to the interests of the national labor policy. The bankruptcy court there allowed rejection of the collective bargaining agreement, expressly applying the test articulated by the court below. The court recognized that there was no contention or evidence that the economic terms of the agreement were "too costly to be sustained by the debtor" or that they had contributed to the bankruptcy. *Id.* at 359. However, the court found it significant that the debtor-in-possession wanted to be able to escape the seniority provisions of the agreement for the alleged purpose of improving production. The evidence indicated that the debtor-in-possession had never established objective production criteria, that the union made clear that it was willing to bargain about production problems and to permit discharge of employees who could be shown to be unproductive, and that the debtor-in-possession had not provided evidence of individual production perform-

ance to either the union or the bankruptcy court. *Id.* at 359-360.[6] The court nevertheless concluded that use of the contractual grievance procedures to resolve contentions that particular employees were unproductive would be "burdensome." *Id.* at 361.

The debtor-in-possession in *Southern Electronics* did not wait for court approval of rejection before disregarding the collective bargaining agreement. Initially it refused to bargain with the union. 23 Bankr. at 353. Soon after the bankruptcy court ordered the debtor-in-possession to abide by the collective bargaining agreement pending the court's determination whether to permit rejection, the debtor-in-possession discharged 14 allegedly underproductive employees and replaced them (but not in order of seniority) with 19 former employees who had been laid off. *Id.* at 354, 359. The debtor-in-possession did not notify the union of its proposal to reject the collective bargaining agreement until the court directed it to do so more than a month after the proposal was submitted. *Id.* at 362. The president of the debtor-in-possession had written to the union that his "main desire [was] to operate in a union free environment" and that "a union free environment is best for my style of management." *Id.* at 362-363. Despite the indications of bad faith on the part of the debtor-in-possession, the court concluded that rejection was proper on the ground that the president of the debtor-in-possession had insisted on making his earlier purchase of the capital stock of the company conditional on rejection of the collective bargaining

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[6] In addition, the evidence indicated that the debtor's difficulties were due not only to poor productivity, but also to lack of effective management. 23 Bankr. at 363.

agreement. *Id.* at 361, 363. The result in *Southern Electronics* can hardly be said to reflect recognition of the national labor policy.

2. Bildisco also contends that it did not violate Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. 158(a)(5), by its initiation or continuance of unilateral changes in the collective bargaining agreement during the post-petition period. It asserts (Br. 28, 37) that it was entitled to make such changes because, after filing a bankruptcy petition, a debtor-in-possession is not bound to comply with the debtor's executory contracts unless and until they are affirmatively adopted. Applicable precedent does not support that contention.

As we explained in our opening brief (at 47), it is well established that a debtor's contractual obligations continue to exist in the period following the filing of a reorganization petition. See also, *e.g.*, *In re Innkeepers of New Castle, Inc.*, 671 F.2d 221, 222, 226 (7th Cir. 1982), cert. denied, No. 82-221 (Oct. 12, 1982) (rejecting the contention that the non-debtor party to an executory contract was entitled only to a reasonable fee rather than to the contractual terms where the contract was neither assumed nor rejected until after the non-debtor party had performed his part of the contract); *Federal's, Inc.* v. *Edmonton Investment Co.*, 555 F.2d 577, 578-579 (6th Cir. 1977) (confirmation of reorganization plan did not discharge an executory contract that was not rejected). As the court explained in *Federal's*, 555 F.2d at 579, "this rule is consistent with the purpose of Chapter XI of enabling debtors to continue their business under court supervision."

Indeed, if Bildisco were correct that the mere filing of a reorganization petition allows a debtor to stop adhering to the terms of an executory contract, then

a non-debtor party to the contract similarly would be entitled to cease dealing with the debtor-in-possession. This result would be inconsistent with the scheme of the Bankruptcy Code, which expressly precludes modification or termination of an executory contract merely because a petition has been filed, a trustee has been appointed, or the financial condition of the debtor is poor. 11 U.S.C. 365(e)(1).[7] See also *In re Alfar Dairy, Inc.*, 458 F.2d 1258, 1261 (5th Cir.), cert. denied, 409 U.S. 1048 (1972) ("[a]ny other rule [than that executory contracts remain in effect] could result in chaos and injustice in bankruptcy proceedings"). Accordingly, the courts have held that collective bargaining agreements remain in effect during the post-petition period until rejected. *In re W. T. Grant Co.*, 620 F.2d 319, 321 (2d Cir.), cert. denied, 446 U.S. 983 (1980); *In re Public Ledger, Inc.*, 161 F.2d 762, 767 (3d Cir. 1947) (rejecting application of doctrine of "experimental assumption" and stating that "[t]he trustees could not seek and accept the benefits of the employment under the

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[7] Section 365(e)(1) of the Bankruptcy Code, 11 U.S.C. 365(e)(1), provides:

> Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on—
>
> (A) the insolvency or financial condition of the debtor at any time before the closing of the case;
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> (B) the commencement of a case under this title; or
>
> (C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

favorable terms of the contract without for the time of enjoying them, accepting and yielding to terms deemed burdensome"); and see *In re Unishops, Inc.*, 553 F.2d 305, 308 (2d Cir. 1977); *In re Smith Jones, Inc.*, 17 Bankr. 126, 128 (Bankr. D. Minn. 1981).[8]

Bildisco urges (Br. 28) that it was not required to adhere to the collective bargaining agreement in the post-petition period because "[t]he trustee or debtor in possession is afforded [a] breathing spell for the express purpose of protecting the bankrupt's estate from claims arising from a failure to perform subsequent to the date of filing." It is true that the automatic stay provision of the Code, 11 U.S.C. 362, gives the debtor a breathing spell from claims of his creditors. However, the protection afforded to a debtor-in-possession is from actions taken by the non-debtor party arising from the debtor's failure to honor pre-petition claims, not from the debtor-in-possession's own failure to honor claims arising during the period of arrangement. "Claims or actions which arise after the commencement of the case are

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[8] In *Local Joint Executive Board* v. *Hotel Circle, Inc.*, 613 F.2d 210, 216-217 (9th Cir. 1980), the court held that a trustee could not affirmatively assume a collective bargaining agreement, so that the debtor's estate would be bound in the future, without the express permission of the bankruptcy court. However, the alleged assumption of the agreement in that case did not involve mere adherence to the terms of a contract; rather it involved the trustee's entry into negotiations for modification and extension of the agreement and adoption of the resulting wage increase and extension agreed on by a multi-employer group. The court did not indicate that the trustee would not be bound by the terms of an existing executory contract during the post-petition, pre-rejection period. Rather, its discussion suggests that the trustee would be so bound (*id.* at 217 n.4).

not included since such a stay would discourage others from dealing with the trustee." 2 *Collier on Bankruptcy* ¶ 362.04[1], at 362-28 (L. King 15th ed. 1983).[9]

The cases Bildisco relies on (Br. 28) do not support its contention that it was entitled to suspend the terms of the collective bargaining agreement during the post-petition, pre-rejection period. In *Sunflower Oil Co.* v. *Wilson*, 142 U.S. 313, 322 (1892), and *In re Rochester Shipbuilding Corp.*, 32 F.Supp. 98 (W.D.N.Y. 1940), the courts rejected contentions of non-debtor parties that a receiver could be forced to continue a contract on the basis that he had not taken immediate steps to disaffirm it. The courts in those cases did not suggest that a receiver could disregard obligations under the contract during the period prior to rejection. Indeed, the court in *Sunflower Oil* emphasized that the receiver, upon taking possession of the property, would pay "the stipulated rental for it so long as he used it." 142 U.S. at 322. In *In re McCormick Lumber & Mfg. Corp.*, 144 F.Supp. 804 (D.Ore. 1956), the court rejected the contention of a conditional sales vendor that it was entitled to reclaim certain machinery on the ground that the trustee's inaction within 60 days of adjudication of

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[9] Moreover, Bildisco clearly is not entitled to a "breathing spell" from enforcement of obligations determined in Board unfair labor practice proceedings. Section 362(b)(4) and (5) of the Bankruptcy Code, 11 U.S.C. 362(b)(4) and (5), expressly exempt from the scope of the automatic stay provision governmental actions to enforce "police or regulatory power." See *Ahrens Aircraft, Inc.* v. *NLRB*, 703 F.2d 23, 24 (1st Cir. 1983); *NLRB* v. *Evans Plumbing Co.*, 639 F.2d 291, 292-293 (5th Cir. 1981). Accordingly, Bildisco's Chapter 11 petition did not operate to stay the unfair labor practice proceedings as to either post-petition or pre-petition claims.

bankruptcy amounted to rejection. However, the court affirmed the referee's award to the vendor of the balance due on the conditional sales contract. In *Pacific Western Oil Co.* v. *McDuffie*, 69 F.2d 208, 213 (9th Cir.), cert. denied, 293 U.S. 568 (1934), the court rejected the contention that a claim for oil delivered under an executory contract *before* the inception of a receivership could be considered an expense of administration because the parties had continued to perform under the contract following inception of the receivership. In *Fletcher* v. *Surprise (In re Northern Indiana Oil Co.)*, 180 F.2d 669, 675-676 (7th Cir.), cert. denied, 340 U.S. 824 (1950), the court held that the trustee did not obtain title to a lease because he failed to assume the lease following his appointment. The issue before the court was whether the trustee was entitled to recover property associated with the lease, not whether he was required to adhere to the terms of the lease. In each of these cases, the comments of the court concerning a "breathing spell" for the receiver do not suggest that the court believed a receiver could ignore its obligations under a contract in the period prior to rejection. Rather, the courts were concerned with the effect of the receiver's failure expressly to assume or reject a contract in the period following the inception of the receivership.

Other cases Bildisco cites (Br. 38) are inapposite because they rest on special principles relevant to property leases. For example, *Philadelphia Co.* v. *Dipple*, 312 U.S. 168 (1941), concerned the tax liability of trustees who operated a business using property subject to leases and operating agreements. The court noted in dictum (*id.* at 174) that prior to affirmance or disaffirmance of such leases and agree-

ments the court could order payment of a reasonable sum for use and occupation. Bildisco relies on these cases for the proposition that "the right to receive compensation for benefits conferred [by a contract not adopted by the debtor-in-possession] is not based upon the debtor in possession's contractual liabilities but instead is an equitable right based upon the reasonable value of the benefits conferred" (Br. 38). In fact, the cited cases appear to be based on the principle that, because the debtor-in-possession does not take title to a lease until it has affirmatively assumed it, its obligation to pay is based on use rather than ownership. See 2 *Collier on Bankruptcy*, *supra*, ¶ 365.03, at 365-24 to 365-25. No such question of assumption of title arises in the case of an ordinary contract or a collective bargaining agreement.[10] The cases cited at pages 12-14, *supra*, and in our opening brief (at page 47) make clear that in such cases con-

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[10] Cf. *United States* v. *Security Industrial Bank*, No. 81-184 (Nov. 30, 1982), slip op. 5 (concluding that Bankruptcy Code does not authorize retroactive destruction of property rights, explaining that "our cases recognize, as did the common law, that the contractual right of a secured creditor to obtain repayment of his debt may be quite different in legal contemplation from the property right of the same creditor in the collateral").

In re Price Chopper Supermarkets, Inc., 19 Bankr. 462, 467 (Bankr. S.D. Cal. 1982), appears to apply the lease cases to rejection of a collective bargaining agreement, stating that an entity that provides services during the reorganization period is entitled to compensation based on the fair market value of the services provided to the estate. To the extent *Price Chopper Supermarkets* suggests that an employer is not bound to adhere to the terms of a collective bargaining agreement in the post-petition, pre-rejection period, we believe it was wrongly decided.

tractual obligations continue to exist in the post-petition, pre-rejection period.[11]

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[11] In any event, even if Bildisco were correct that it was not bound by the terms of the collective bargaining agreement during the post-petition, pre-rejection period, it does not follow that a unilateral change in working conditions could not be found to be an unfair labor practice. Bildisco does not challenge the proposition that, as debtor-in-possession, it was required to bargain with the Union about the bargaining unit employees' terms and conditions of employment. See Bildisco Br. 23, 32, 40. As Amicus Curiae American Federation of Labor—Congress of Industrial Organizations points out (Br. 14-24), federal statutes that regulate the conduct of business are not suspended merely because a business is being conducted by a debtor-in-possession or trustee under the supervision of a bankruptcy court. Nothing in the policy of the bankruptcy laws relieves Bildisco of its obligation under the National Labor Relations Act to bargain during the post-petition period. Accordingly, the Board could find Bildisco's unilateral action to be a violation of its duty to bargain with the Union even if the contract were in a state of suspension. As Amicus Curiae Chamber of Commerce appears to concede (Br. 3-4 n.4), claims based on unfair labor practices committed by the debtor-in-possession in the post-petition period are accorded a first priority as administrative claims. See also our opening brief at 49 n.38.

Bildisco's argument actually goes not to whether its unilateral changes during the post-petition, pre-rejection period could be found by the Board to be an unfair labor practice, but to the proper measure of damages. Thus, Bildisco apparently asserts that the employees who work for it during the post-petition period are entitled only to the reasonable value of their services unless the contract is assumed. But whether or not the contract is binding on Bildisco during that period, the Board could properly order Bildisco to pay the previously negotiated wage and benefit rates until it fulfilled its obligation to bargain about changes in working conditions. See *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 216 (1964), and the discussion in our opening brief at 23 n.11.

For the foregoing reasons, and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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